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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 KENNETH ALAN HUGHES,
8 Plaintiff,
9 v.
10 MICHAEL J. ASTRUE, Commissioner
11 of Social Security Administration,
12 Defendant.

NO: 12-CV-0168-TOR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

13 BEFORE THE COURT are the parties' cross motions for summary
14 judgment, ECF Nos. 16 and 20. The Court has reviewed the administrative record
15 and the parties' completed briefing and is fully informed. There being no reason to
16 delay a decision, the hearing set for March 10, 2014, is vacated and this matter is
17 submitted without oral argument.

18 Kenneth Alan Hughes seeks judicial review of the Commissioner's final
19 decision denying him Title II Disability Insurance Benefits and Title XVI
20 Supplemental Security Income.

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

STANDARD OF REVIEW

A district court’s review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under §405(g) is limited: the Commissioner’s decision will be disturbed “only if it is not supported by substantial evidence or is based on legal error.” *Hill v. Astrue*, 688 F.3d 1144, 1149 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). “Substantial evidence” means relevant evidence that “a reasonable mind might accept as adequate to support a conclusion.” *Id.* (quotation and citation omitted). Stated differently, substantial evidence equates to “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and citation omitted). In determining whether this standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. If the evidence in the record “is susceptible to more than one rational interpretation, [the court] must uphold the ALJ’s findings if they are supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district

1 court “may not reverse an ALJ’s decision on account of an error that is harmless.”
2 *Id.* at 1111. An error is harmless “where it is inconsequential to the [ALJ’s]
3 ultimate nondisability determination.” *Id.* at 1115 (quotation and citation omitted).
4 The party appealing the ALJ’s decision generally bears the burden of establishing
5 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

6 FIVE-STEP SEQUENTIAL EVALUATION PROCESS

7 A claimant must satisfy two conditions to be considered “disabled” within
8 the meaning of the Social Security Act. First, the claimant must be “unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months.” 42 U.S.C. §§ 423(d)(1)(A); 1382c(a)(3)(A). Second, the claimant’s
13 impairment must be “of such severity that he [or she] is not only unable to do his
14 [or her] previous work[,] but cannot, considering his age, education, and work
15 experience, engage in any other kind of substantial gainful work which exists in
16 the national economy.” 42 U.S.C. §§ 423(d)(2)(A); 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See Molina v. Astrue*,
19 674 F.3d at 1110; 20 C.F.R. §§ 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step
20 one, the Commissioner considers the claimant’s work activity. 20 C.F.R. §§

1 404.1520(a)(4)(i); 416.920(a)(4)(i). If the claimant is engaged in “substantial
2 gainful activity,” the Commissioner must find that the claimant is not disabled. 20
3 C.F.R. §§ 404.1520(b); 416.920(b).

4 If the claimant is not engaged in substantial gainful activities, the analysis
5 proceeds to step two. At this step, the Commissioner considers the severity of the
6 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the
7 claimant suffers from “any impairment or combination of impairments which
8 significantly limits [his or her] physical or mental ability to do basic work
9 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);
10 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
11 however, the Commissioner must find that the claimant is not disabled. *Id.*

12 At step three, the Commissioner compares the claimant’s impairment to
13 several impairments recognized by the Commissioner to be so severe as to
14 preclude a person from engaging in substantial gainful activity. 20 C.F.R. §§
15 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more
16 severe than one of the enumerated impairments, the Commissioner must find the
17 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

18 If the severity of the claimant’s impairment does meet or exceed the severity
19 of the enumerated impairments, the Commissioner must pause to make an
20 assessment of the claimant’s “residual functional capacity.” Residual functional

1 capacity (“RFC”), defined generally as the most that the claimant can still do in a
2 work setting despite his or her limitations (20 C.F.R. §§ 404.1545(a)(1);
3 416.945(a)(1)), is relevant to both the fourth and fifth steps of the analysis.

4 At step four, the Commissioner considers whether, in view of the claimant’s
5 RFC, the claimant is capable of performing work that he or she has performed in
6 the past (“past relevant work”). 20 C.F.R. §§ 404.1520(a)(4)(iv);
7 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the
8 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
9 404.1520(f); 416.920(f). If the claimant is incapable of performing such work, the
10 analysis proceeds to step five.

11 At step five, the Commissioner considers whether, in view of the claimant’s
12 RFC, the claimant is capable of performing other work in the national economy.
13 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,
14 the Commissioner must also consider vocational factors such as the claimant’s age,
15 education and work experience. *Id.* If the claimant is capable of adjusting to other
16 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
17 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other
18 work, the analysis concludes with a finding that the claimant is disabled and is
19 therefore entitled to benefits. *Id.*

The claimant bears the burden of proof at steps one through four above.

Molina v. Astrue, 674 F.3d at 1111; *Lockwood v. Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010). If the analysis proceeds to step five, the burden shifts to the Commissioner to establish that (1) the claimant is capable of performing other work; and (2) such work “exists in significant numbers in the national economy.” 20 C.F.R. §§ 404.1560(c); 416.960(c)(2); *Beltran v. Astrue*, 676 F.3d 1203, 1206 (9th Cir. 2012).

ALJ'S FINDINGS

Plaintiff applied for Title II Disability Insurance Benefits and Title XVI Supplemental Security Income payments on April 20, 2009, Tr. 128-42, alleging a disability onset date of March 15, 2009. Tr. 135. Plaintiff was 27 years old on his alleged disability onset date. Tr. 10, 128, 135. The parties are fully familiar with Plaintiff's infirmities and there is no reason to recount them in this public record. Plaintiff's applications were denied initially and upon reconsideration. Tr. 10, 65-76, 78-83. He requested a hearing by an administrative law judge (ALJ), Tr. 88-89, and on May 27, 2010, he appeared, accompanied by counsel and testified at the hearing. Tr. 10, 24-64. Thereafter, the ALJ found Plaintiff was not disabled through June 16, 2010, as the ALJ found Plaintiff could perform his past relevant work as a construction worker and materials handler as actually and generally performed. Tr. 18. In the alternative, the ALJ found this "younger individual"

1 could make an adjustment to other work existing in significant numbers in the
2 national economy. Tr. 18-19.

3 The Appeals Council denied review, Tr. 1-5, making the ALJ's decision the
4 Commissioner's final decision subject to judicial review.

5 ISSUES

6 Plaintiff raises three contentions for review: 1) that the ALJ's step two
7 finding is flawed; 2) that the ALJ improperly evaluated the medical evidence; and
8 3) that the ALJ's hypothetical question to the vocational expert was incomplete or
9 unsupported by the record. ECF No. 17 at 9-13.

10 The Commissioner contends he supported the final decision in this matter
11 with substantial evidence and it is free of any harmful legal error.

12 DISCUSSION

13 **A. The ALJ's Finding of Lack of Severe Impairment at Step 2**

14 Plaintiff contends Dr. Arnold diagnosed a personality disorder, not otherwise
15 specified, that "presumably" resulted in moderate limitations, but the ALJ failed to
16 find Plaintiff had a severe impairment at step 2. ECF No. 17 at 10.

17 The Commissioner contends Plaintiff has not identified any of these
18 additional limitations. ECF No. 21 at 12. Alternatively, the Commissioner
19 contends that any error in finding the impairment non-severe at step two is

1 harmless because the ALJ proceeded with the sequential evaluation process and
2 accounted for any resulting limitations. *Id.*

3 Plaintiff bears the burden to establish the existence of a severe impairment
4 or combination of impairments, which prevent him from performing substantial
5 gainful activity, and that the impairment or combination of impairments lasted for
6 at least twelve continuous months. 20 C.F.R. §§ 404.1505, 404.1512; 416.905,
7 416.912; *Edlund v. Massanari*, 253 F.3d 1152, 1159-60 (9th Cir. 2001). An
8 impairment, to be considered severe, must significantly limit an individual's ability
9 to perform basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c); *Smolen v.*
10 *Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). An impairment(s) that is "not severe"
11 must be a slight abnormality (or a combination of slight abnormalities) that has no
12 more than a minimal effect on the ability to do basic work activities. SSR 96-3P,
13 1996 WL 374181.

14 In September 2005, John Arnold, Ph.D., performed a psychological
15 evaluation of Plaintiff for the Washington State Department of Social and Health
16 Services. Tr. 322-27. Dr. Arnold indicated that Plaintiff's MMPI-2 test results
17 were "not suggestive of severe psych problems." Tr. 325. Dr. Arnold noted some
18 moderate "functional limitations" on the checklist form. Tr. 324. If these
19 limitations are the ones Plaintiff now complains about, which is not at all clear
20

1 from his briefing, then he is mistaken as to their weight.¹ In isolation these
2 limitations appear significant, in context of the entire report they are not. On this
3 historical 2005 checklist evaluation, Dr. Arnold indicated that he expected these
4 limitations to last a minimum and maximum of only 6 months. Tr. 325. He also
5 opined that mental health intervention, specifically “social skills/conflict resolution
6 training” would restore or substantially improve Plaintiff’s ability to work. Tr.
7 325.

8 The ALJ exhaustively reviewed and recounted all of the medical and “non-
9 medical” evidence submitted. Tr. 14-18. The residual functional capacity
10 determined by the ALJ correlated and accounted for the findings and opinions of
11 Dr. Quackenbush, Dr. Gentile, Dr. Mee, Dr. Arnold, Dr. Staley, Dr. Scottolini, Ms.
12 Nelson, MSW, and Plaintiff’s mother, Ms. Schlecht. Tr. 18.

13 The Court determines that substantial evidence in the record supports the
14 ALJ’s decision.

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18 ¹ Later in his briefing, Plaintiff complains about one moderate limitation Dr.
19 Arnold checked in 2005: “Ability to respond appropriately to and tolerate the
20 pressure and expectations of a normal work setting.” ECF No. 17 at 12; Tr. 324.

1 **B. The ALJ's Evaluation of the Medical Evidence**

2 Plaintiff contends the ALJ did not consider "all the limitations given by" two
3 psychological evaluations and the DDS records. ECF No. 17 at 11. Plaintiff again
4 fails to mention what additional limitations were left out of the ALJ's assessment.
5 Without any more specificity, the Court is left to speculate as to what Plaintiff's
6 argument would be. Plaintiff provides no argument or analysis whatsoever, and
7 may well have waived this issue. In an abundance of caution, the Court has
8 reviewed the two psychological evaluations and the DDS records.

9 Plaintiff's recitation of the facts does however acknowledge that Dr.
10 Quackenbush questioned whether Plaintiff could tolerate the pressures and
11 expectations of full-time work. In July 2009, Dr. Quackenbush observed that
12 Plaintiff was then currently employed on a part-time basis and had been able to
13 maintain this position for approximately 1.5 years. Tr. 291. Dr. Quackenbush
14 then commented: "Whether Claimant can effectively tolerate the pressures and
15 expectations of a full-time work setting could be questioned. Mental health
16 counseling may prove beneficial in terms of bolstering Claimant's general coping
17 skills." Tr. 291. Dr. Quackenbush did not opine that Plaintiff could not tolerate
18 the stress and in fact offered that counseling may prove beneficial.

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1 The Court discerns that neither Dr. Quackenbush's question nor anything
2 else in the record detracts from the substantial evidence supporting the ALJ's
3 determination.

4 **C. The ALJ's Hypothetical Question to the Vocational Expert**

5 Plaintiff challenges the ALJ's hypothetical question to the vocational expert
6 for not including additional limitations. Specifically, he faults the hypothetical
7 question for not including "at least moderate limitations in the ability to respond
8 appropriately to and tolerate the pressure and expectations of a normal work
9 setting." ECF No. 17 at 12.

10 The Commissioner contends the hypothetical question appropriately
11 included only those limitations that were supported by substantial evidence in the
12 record.

13 The question posed to the vocational expert included, in relevant part:

14 . . . could you tell me if there are jobs available . . . This individual
15 would be able to do only simple, routine, and repetitive one-to-three
16 step tasks. Avoid detailed work. Only occasional interaction with the
17 public and coworkers. And, this individual should work with things,
18 for the most part, rather than people. Would any of Mr. Hughes' jobs
19 still be viable?

20 Tr. 60. In response to the hypothetical question posed by the ALJ, the vocational
21 expert testified Plaintiff could perform his past relevant work as a construction
22 worker II and materials handler. Tr. 60-61. Thus, the ALJ found the Plaintiff was
23 not disabled at step 4 of the sequential evaluation process. Tr. 18. In the

1 alternative, the ALJ proceeded to step 5 and found Plaintiff could make an
2 adjustment to other work existing in significant numbers in the national economy
3 and gave the following example: industrial cleaner with approximately 3.5 million
4 jobs in the national economy and approximately 45,000 jobs in the region. Tr. 18-
5 19. This finding was based on the vocational expert's testimony in response to the
6 hypothetical question posed earlier. Tr. 61.

7 The limitations found by the ALJ and no others were supported by
8 substantial evidence.

9 **ACCORDINGLY, IT IS HEREBY ORDERED:**

10 1. Plaintiff's Motion for Summary Judgment, ECF No. 16, is **DENIED**.

11 2. Defendant's Motion for Summary Judgment, ECF No. 20, is

12 **GRANTED**.

13 3. The hearing set for March 10, 2014, is **VACATED**.

14 The District Court Executive is hereby directed to file this Order, enter
15 Judgment accordingly, furnish copies to counsel, and **CLOSE** this file.

16 **DATED** this 7th day of November, 2012.

17 *s/ Thomas O. Rice*

18 THOMAS O. RICE
19 United States District Judge